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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 647

A. B. MOMAND,

Petitioner,

vs.

THE UNIVERSAL FILM EXCHANGES, INC., ET AL.

PETITION FOR REHEARING

JOHN W. CRAGUN,
JOHN F. CLAGETT,
HAROLD L. SCHILZ,
Counsel for Petitioner.



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A. B. MOMAND,

vs.

Petitioner,

THE UNIVERSAL FILM EXCHANGES, INC., ET AL.

PETITION FOR REHEARING

A. B. Momand, petitioner in the above-captioned cause, respectfully petitions the Court to rehear its order of May 2, 1949, denying his petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below

Opinions of the District Court appear at pp. 70, 91, 108, 140, 187, and following of the record. The one at p. 187 of the record was adopted by the Court of Appeals and is the opinion primarily involved in this case at this time. That opinion is reported in 72 F. Supp. 469, except that the report does not contain the schedules and appended analyses of the District Court showing the several issues which actually went to trial. The opinion of the United States Circuit Court of Appeals for the First Circuit appears in the record at p. 2016, and is reported in 172 F. 2d 37.

Grounds Upon Which a Rehearing is Sought

The court below made three major rulings with respect to petitioner's case. Two of these do not go to the entire case; they merely limit the extent of the recovery if petitioner were otherwise entitled to recover. Only the first of the grounds goes to petitioner's entire case; that first ground, as to matters with which the petition did not deal, furnishes the matters which undersigned counsel regard as presenting a serious conflict between the circuits on the basis of which this Court should grant the petition for rehearing and the writ of certiorari. A specification of errors intended to be urged, omitted from the petition for writ of certiorari, is set forth in the appendix.

This ground of the decision below which goes to the entire case is the question of the failure of petitioner's proof as a matter of law for the reason that—albeit true that the respondents violated the antitrust laws and that under §5 of the Clayton Act plaintiff is entitled to regard decrees in cases brought by the United States as *res judicata*—still respondents are not shown to have had any “specific intent” to injure plaintiff, and it follows that petitioner has suffered no injury at their hands.

Plaintiff, the petitioner, operated moving-picture houses in Oklahoma until the business failed—as petitioner claims (and as the jury here found under appropriate instructions) by reason of the unlawful combination and conspiracy of respondents. Not alone has that combination and conspiracy of respondents been specifically found with regard to the compulsory arbitration of disputes between motion-picture exhibitors (like petitioner) and respondents (*Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30) and with regard to credit committees (*United States v. First National Pictures, Inc.*, 282 U. S. 44). But § 5 of the Clayton Act provides that a final judgment or

decree in a prosecution or proceeding brought by the United States under the antitrust laws "shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." The section also provides for tolling the statute of limitations during the pendency of a proceeding or prosecution by the United States.¹ And in this case petitioner has brought himself squarely within the ultimate determinations of the cases prosecuted by the United States; in the case of each of the corporations in whose right this action is brought, petitioner (the exhibitor) was subjected to the very devices of the conspirators regarding arbitration and credit which have been held to violate the law. Under § 5, therefore, it seems apparent that petitioner is entitled to recover the damages suffered through the combination with no more than proof of the extent of those damages within the rules laid down by this Court starting with *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, 562, and culminating, so far as motion-picture cases like the present are concerned, with *Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 263-265.

The courts below have, however, found a novel excuse from damages for combines and conspiracies like respondents who have defied the antitrust laws. Notwithstanding four volumes of record devoted to the specific question of damages from these two unlawful practices, and notwithstanding careful instruction of the jury, that "of course you are not to take into account losses which are attributable to other things" (R. 1181, and see 1176-7); and notwithstand-

¹ Section 5 is set forth in full text in the appendix. It appears in Act of October 15, 1914, c. 323, 38 Stat. 730, 731, § 5; 15 U.S.C. § 16.

ing the verdict of the jury (R. 1194-1195, 1198-1199), the court below has stated:

“If plaintiff, without showing any *specific intent of defendants to injure him* or any specific damaging transaction, proceeded voluntarily to make business arrangements which caused damages running to one-third of a million dollars, that conduct was too extravagant to be charged to defendants. The point is ably and fully discussed in the District Court’s opinion, 72 F. Sup. 469, 476, 477. We approve what is said there, and see no need to review the question further.” (R. 2020, italics supplied.)

The decision of the District Court to which reference is thus made is a careful and learned inquiry into the rule of mitigation of damages required of a plaintiff, who must do what he can to avert future harm and may not continue to permit himself to suffer damages to be billed to the defendant. Judge Wyzanski has, in the material cited (R. 197-199), brought to bear under the antitrust law, rulings and principles derived from the ancient law of damages in private torts which heretofore have been rejected by the courts. The natural effect of the imposition of such a doctrine in antitrust litigation is to allow damages only when the victim of the combination must go out of business on the occasion of the first unlawful assault made upon him.

But the rule applied elsewhere in an action where § 5 of the Clayton Act is available has been understood much more simply.² It is not whether there is a “specific intent” or whether the damages ought to be reduced by reason of plaintiff’s failure to mitigate damages, but rather whether

² It appears probable that Judge Wyzanski may be somewhat baffled by this Court’s opinion in the *Bigelow* case, 327 U. S. 251. He ultimately disposes of its otherwise clear application to this aspect of this case by looking at a different problem of concern in that case, and so finding that the *Bigelow* case, as shown by its citations, “is the recurrent problem of certainty of causation in statutory and non-statutory torts.” R. 209.

the plaintiff has been damaged. Thus it has been held, *Johnson v. Joseph Schlitz Brewing Co.* (E. D. Tenn. 1940), 33 F. Supp. 176, 180, aff'd. (C. C. A. 6th, 1940), 123 F. 2d 1016:

"Once an illegal conspiracy in violation of the Sherman Act is shown, all the plaintiff need do is to show his damages. *Montague v. Lowry*, 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 608; *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U. S. 268, 55 S. Ct. 182, 79 L. Ed. 356; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 47 S. Ct. 400, 71 L. Ed. 684."

And if petitioner entered into contracts with respondents who by concert and conspiracy gave him no alternative, how can the very wrong be pleaded by respondents as an excuse from damages? Even where an alternative to the injurious contracts is offered by the distributor-conspirators, it is held, where the alternative is itself unreasonable, that the alternative may not excuse the conspirators but instead augment the damages. *Ball v. Paramount Pictures* (C. C. A. 3d, 1948), 169 F. 2d 317, 321. Here, respondents have pointed to no alternative open to petitioner—reasonable or not.

This case is productive of conflict within the very ambit of the motion-picture cases. In *Theatre Inv. Co. v. R. K. O. Radio Pictures* (W.D. Wash. 1947), 72 F. Supp. 650, 657-7, the court found that if plaintiff did participate in the alleged monopoly and conspiracy to monopolize, it was due to the coercion by defendants and to the business necessity of reliance upon such film supply as they could obtain from the defendants upon defendants' terms in order that the plaintiffs might stay in business under the conditions confronting them, there being no adequate film supply other than defendants' available to them. In the present case

the District Court, in his learned opinion, pays no attention to the business necessity in which the repeated or continued damages or injuries were sustained, or to the rules prescribing pecuniary relief to one "injured in his business and property" according to the terms of the Sherman and Clayton Acts, or to the fact that those rules must be distinguished from the rules applicable in traditional or conventional actions for damages. See article by Professor Lawrence Vold, *A. Threefold Damages under the Anti-trust Act Penal or Compensatory?* 28 Ky. L. J. 117, 137-159.

In the ordinary case the courts find merely that the final decree obtained by the United States in its proceeding itself establishes the *prima facie* case with only the requirement of proving that the plaintiff is one damaged by the unlawful combination or conspiracy. Thus, the Second Circuit has observed "that the decree of 1916 ran against all these defendants and under the Clayton Act (15 U. S. C. A. § 16) was itself *prima facie* evidence of their violation of the law. The evidence introduced, far from overcoming the *prima facie* effect of the decree, strongly tended to support the plaintiffs' allegations." *William H. Rankin Co. v. Associated Bill Posters of U. S.* (C. C. A. 2d, 1930), 42 F. 2d 152, 154, cert. den. 282 U. S. 864.

The ordinary course of a case such as this has been so well understood that the asserted discovery of a new³ escape hatch such as that found below must be viewed with

³ It is of passing interest to note that the words "specific intent" do not appear for the first time in antitrust decisions in the opinion below. The writer of the opinion below, as a member of the United States Court of Appeals for the Third Circuit, participated in the decision of *Ball v. Paramount Pictures* (C.C.A. 3d, 1948), 149 F. 2d 317, where, in referring to this Court's decision in *United States v. Paramount* (334 U. S. 131), the court stated "that case also reiterates that specific intent is not necessary in such a situation as is before us." The writer of the opinion below dissented in that case from the opinion of the majority holding the distributors liable. Sitting in the First Circuit by designation, the same phrase creeps into the opinion as the deter-

suspicion; for this Court, in repeated cases starting with *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555, has ruled that the plaintiff, once the unlawful combination is established (as here it is established under § 5 of the Clayton Act), need show certainly that he was damaged (as here the jury, under appropriate instructions, has found that he was damaged), and that uncertainty as to the precise amount of damages (here given the novel term "lack of specific intent" or "any specific damaging transaction") may not be urged to preclude him from getting any of the damages that he has certainly suffered.

Bigelow v. R. K. O. Radio Pictures, 327 U. S. 251, 263-265;

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 378-379;

Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176; aff'd. (C. C. A. 6th, 1940), 123 F. 2d 1016;

Ellis v. Inman, Poulsen & Co. (C. C. A. 9th, 1904), 131 Fed. 182, 186;

Package Closure Corp. v. Sealright Co. (C. C. A. 2d, 1944), 141 F. 2d 972, 978;

American Can Co. v. Ladoga Can Co. (C. C. A. 7th, 1930), 44 F. 2d 763, cert. den. 282 U. S. 899;

Daniel, Enforcement of the Sherman Act by Actions for Treble Damages (1948), 34 Va. L. Rev. 901, 903-907.

Not alone is there conflict between the circuits. Many cases arising out of the Government decree (*United States v. Paramount Pictures*, 334 U. S. 131) are pending, and will doubtless be affected by the ruling of the First Circuit Court of Appeals herein. In each, the question of

minative feature on which a result must be reached for the conspirators, rather than for the moving-picture exhibitor as was done in the *Ball* case. The phrase "specific intent" may or may not be used with different content and application in the *Ball* case as compared with its use in the present case.

the application of § 5 of the Clayton Act is involved, so that the new possibility of defeating the policy of the antitrust laws through requiring a showing of "specific intent" undoubtedly will be urged by these same conspirators in the other cases to make certain that they shall not suffer the consequences of their unlawful acts insofar as exhibitors have been driven to the wall merely by the general operation of the conspiracy, as opposed to some specific purpose to injure the particular exhibitor. Such cases are *Fifth and Walnut, Inc. v. Loew's Inc., et al.* (U.S.D.C., S.D., N.Y., now on appeal); *Windsor Theatre Co. v. Loew's Inc.* (No. 814-48, U.S.D.C., Dist. Col.); *H. B. Meiselman, et al. v. Paramount Pictures Distributing Corp.* (C.A. 669, U.S.D.C., W.D., N.C.); *Emerson W. Long, et al. v. Schine Theatrical Co., et al.* (C.A. No. 25795, U.S.D.C., N.D., Ohio); *Auburn v. Schine* (C.A. 48-736, U.S. D.C., S.D., N.Y.).

Conclusion

The petition for rehearing and the writ of certiorari should be granted.

Respectfully submitted,

JOHN W. CRAGUN,
JOHN F. CLAGETT,
HAROLD L. SCHILZ,
Counsel for Petitioner.

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay; and that the petition is restricted to substantial grounds available to petitioner although not previously presented.

JOHN W. CRAGUN,
JOHN F. CLAGETT,
HAROLD L. SCHILZ

APPENDIX

Specification of Errors Intended to be Urged

The Court below erred:

1. In determining, with respect to the applicable statute of limitations, that:

(a) Both Massachusetts and Oklahoma statutes apply.

(b) The statute can commence to run prior to the time the conspiracy is discovered.

(c) The statute commenced to run prior to the cessation of the acts constituting the wrong.

(d) The statute is not tolled by § 5 of the Clayton Act unless the private action is on the entire cause complained in the government's proceedings.

(e) Holding that the only two government suits which might toll the statute were *Paramount Famous Lasky Corp. v. United States* (282 U. S. 30) and *United States v. First National Pictures, Inc.* (282 U. S. 44).

2. As to *res judicata* (estoppel by judgment):

(a) In holding that the findings as to conspiracy in the Oklahoma proceedings constitute an estoppel in the present action.

(b) In failing to hold that the legal claimant had so changed that the Oklahoma judgment might not be applied herein.

(c) In failing to hold that the mandate of the United States Circuit Court of Appeals for the Tenth Circuit directing the Oklahoma action to be dismissed without prejudice precluded holding the judgment in that case to be an estoppel.

(d) In holding that an estoppel might lie despite the different capacities in which the parties appeared in the two actions.

3. With respect to the issue of damages:

(a) In holding that it is necessary for petitioner to prove that respondents had any specific intent to injure petitioner.

(b) In holding that petitioner's failure to pay arbitration awards precluded the establishment of damages.

(c) In holding that petitioner had failed to prove the amount of his damages certainly.

(d) In holding that petitioner need, under § 5 of the Clayton Act, do more than establish damages suffered as a result of the combination and conspiracy.

(e) In holding that petitioner was precluded from recovering damages by reason of having entered into repeated contracts with the unlawful provisions.

(f) In failing to hold that business necessity compelled entering into the repeated contracts.

4. In reviewing the action of a jury, properly instructed, and with evidence before it to support its verdict.

5. In sustaining the action of the District Court.

Clayton Act, § 5

(Act of October 15, 1944, c. 323, Stat. 730, 731,
15 U.S.C. § 16.)

A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust

laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

(2607)

CITATIONS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 647

A. B. MOMAND
Petitioner

v.

**UNIVERSAL FILM EXCHANGES, INC., LOEW'S
INC., METRO-GOLDWYN-MAYER DISTRIBUT-
ING CORPORATION, TWENTIETH CENTURY-
FOX FILM CORPORATION, VITAGRAPH, INC.,
RKO DISTRIBUTING CORPORATION, UNITED
ARTISTS CORPORATION, COLUMBIA PICTURES
CORPORATION**
Respondents

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
FIRST CIRCUIT**

**BRIEF FOR THE RESPONDENTS IN OPPOSITION
TO PETITION FOR REHEARING**

The petition for rehearing filed herein raises in re-phrased form one of the questions which was raised by the original petition, (see pars. 9 and 10 of the "Questions Presented" in the petition (page 15) and pars. 8 and 9 in the "Reasons relied on for the allowance of the writ")

(page 18)), and argued in the supporting brief (pages 35-8). This would in and of itself be sufficient reason for denying the petition under the provisions of Rule 33 of this Court. The rephrased question, moreover, challenging as it does a phrase taken out of the context of the opinion below, surely falls far short of the "substantial grounds" required by the Rule.

Assuming, however, that the point represented by and reargued in the petition for rehearing is one which is now open for consideration, it is still clear that the petition should be denied.

The ground asserted as the basis for the petition for rehearing ignores wholly the effect of the estoppel by judgment and *res judicata* resulting from the judgments in favor of the respondents in the earlier actions brought by the plaintiff in Oklahoma (see Respondents' Brief in Opposition, pages 2 to 9), seizes upon a dictum in the opinion of the Court of Appeals, wrests it from its context, and seeks to make it say something which the Court did not say. The Court of Appeals never held, as asserted in the petition for rehearing, that a plaintiff in an anti-trust action must show a "specific intent to injure" in order to recover. All that the Court of Appeals said on this subject appears at page 2020 of the Record (71 F. 2d 41-2), namely, that the petitioner herein could not recover in his continued litigation in the Massachusetts Court a loss claimed to have been caused by a conspiracy to force poor pictures and late bookings upon his assignors because it had been found in the earlier Oklahoma suit that there had been no such conspiracy and, furthermore, that even if any of the petitioner's claims were "free of the estoppel, and none appeared to be" (R. 2020) the petitioner inferentially could not recover *extraordinary* damages resulting from voluntary adoption by his assignors of an extravagant and unreasonable

course of conduct to avoid threatened harm of a relatively minor character in the absence of a showing of a specific intent of the respondents to injure the plaintiff's assignors. This was a proper paraphrase of well-settled principles of tort law and of damages as set forth in sections 918 and 919 of the Restatement of Torts and as to which there is no conflict with the decisions either of this Court or of any Circuit Court of Appeals. So far as this Court has spoken, its statements support the proposition. See *Chesapeake & Ohio Ry. v. Kelly*, 241 U. S. 485 at 489 and cases cited. The proposition is in no sense a holding that a specific intent to injure is necessary as a prerequisite to any recovery in an anti-trust action. The Court of Appeals indeed ruled to the contrary. It cited as guiding cases on the matter of damages the decisions of this Court in *Bigelow v. RKO Radio Pictures*, 327 U. S. 251; *Eastman Kodak Co. v. Southern Photo Co.*, 273 U. S. 359; and *Story Parchment Co. v. Paterson Co.*, 282 U. S. 555 (R. 2021) with particular emphasis on the portion of the opinion of this Court in the *Story* case at page 562 to the effect that if some damages are found to be attributable to the wrong the plaintiff is entitled to have them assessed by the jury even if they are uncertain in amount.

CONCLUSION

It is accordingly submitted that the Petition for Rehearing should be denied.

Respectfully submitted,

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for Respondents

NUTTER, McCLENNEN & FISH
of Counsel

June, 1949